

ADAMONT N. GEORGESON (57087)
J. EDWARD KERLEY (175695)
DOHERTY GEORGESON KERLEY LLP
999 Fifth Avenue, Suite 400
San Rafael, CA 94901
(415) 453-2300
(415) 455-0270 Facsimile

Attorneys for Plaintiffs
John Pettitt, Murphy Labrador
Corporation and Barbara Musser on
behalf of the MAX GSD Trust of
1996 as Trustee

E-filing

COPY

CW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN PETTITT, MURPHY LABRADOR
CORPORATION, MAX GSD TRUST OF
1996 BY BARBARA MUSSER,
TRUSTEE,

CV 07

5854

COMPLAINT AND:
DEMAND FOR JURY TRIAL

Plaintiffs,

v.

JOHN CHIANG, individually and in his
capacity as STATE CONTROLLER OF
THE STATE OF CALIFORNIA,

Defendant.

Plaintiffs John Pettitt, Murphy Labrador Corporation, MAX GSD Trust of 1996 by
Barbara Musser, Trustee, (collectively, the "Plaintiffs"), allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331,
and 1343. This action arises under the "Takings Clause" of the Fifth Amendment, the
Due Process Clause of the Fourteenth Amendment, and the Contract Clause of Article 1,
Section 10 of the United States Constitution.

2. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b)(1), because the Defendant's conduct occurred in the judicial district, and pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.

PARTIES

3. Plaintiff John Pettitt, a citizen of Great Britain, an individual who lawfully resides in the U.S., is the Trustor of the MAX GSD TRUST OF 1996 that held 100,000 shares of stock, among other investments, in Cybersource Corporation (CYBS).

4. MURPHY LABRADOR CORPORATION ("MLC") is a holding company whose purpose was to hold investments, including the shares of CYBS, for the benefit of the MAX GSD TRUST. MLC was at all times relevant herein, wholly owned and held as an asset of the MAX GSD TRUST.

5. Plaintiff Barbara Musser is an individual and taxpayer who resides in Petaluma, California, and is the Trustee of the MAX GSD TRUST OF 1996 that held the CYBS stock.

6. Defendant John Chiang holds the elected position of Controller for the State of California. Defendant is named in his individual capacity and in his official capacity as Controller of the State of California.

EQUITABLE ESTOPPEL AND THE TOLLING OF THE STATUTE OF LIMITATIONS

7. As a result of Defendant's acts, any statutes of limitation applicable to the claims asserted in this Complaint have been tolled or equitably estopped. Defendant was able to conceal from Plaintiffs the material facts involving their investment in CYBS. Defendant

1 seized Plaintiffs' CYBS stock without Due Process and converted the same for its own
2 use. Based on Defendant's breach of his statutory obligation to notify Plaintiffs,
3 Defendant is estopped from asserting a statute of limitations and has waived any such
4 defense.
5

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

NATURE OF THIS ACTION

8. This action is based on the unconstitutional conduct of Defendant under color of
state law in seizing and liquidating approximately 1,500,000 in CYBS stock of Plaintiffs.

9. Defendant is the elected official charged under the California Constitution with
overseeing the estimated \$4.1 billion Unclaimed Property Fund pursuant to California's
Unclaimed Property Law (hereinafter "UPL"), California Code of Civil Procedure
Section 1300 *et seq.* Defendant has unlawfully seized and improperly liquidated
Plaintiffs' CYBS stock, and is withholding the proper amounts that Plaintiffs are entitled
to.

10. Plaintiffs are informed and believe that the Defendant, using color of law,
interfered with the contractual and fiduciary relations that run from corporations and their
agents to Plaintiffs, who are stockholders in CYBS. At times, Defendant directed and
enabled his agents to force the surrender of stock investments, which was done under
threat of fines and penalties issued by Defendant against the corporations and their
agents. On information and belief, Defendant hired agents who are paid a consulting fee
together with a "bounty" or percentage of all investments seized from corporations. In
order to comply with the Defendant's demands, corporations and their agents surrender

DOHERTY GEORGESON KERLEY LLP
999 Fifth Avenue, Suite 400
San Rafael, CA 94901
(415) 453-2300

1 duplicate stock certificates. Once the Controller receives the duplicate certificates, the
2 stock investments are sold through private brokers and the proceeds are deposited in the
3 general fund for the State of California.
4

5 11. Plaintiffs are informed and believe that starting in or about 1995, Defendant made
6 the purposeful decision to disregard notice and due process obligations. Defendant
7 determined that it was "impractical" and not cost effective to publish the individual
8 names, addresses and stock information as required by statute, nor was it necessary to
9 notify known stockholders with direct mail notice. Instead, Defendant determined that
10 generic "block ads" were sufficient constitutional notice to the owners of the stock
11 investments. Consequently, the investors whose stock was seized and sold by the
12 Controller have no reason to suspect that their investments were taken.
13
14

15 12. Thus, as discussed in greater detail below, Defendant's actions in taking
16 possession of Plaintiffs' stock investments without notice and due process or the
17 knowledge and consent of the Plaintiffs violates the express provisions of the UPL,
18 Article I. § 7 of the California Constitution, and the Fifth and Fourteenth Amendments of
19 the United States Constitution.
20

21 FACTUAL ALLEGATIONS

22 A. The Plaintiffs And Their Property.

23
24 13. John Pettitt is a citizen of England and worked on the development of software for
25 CYBS during the period of roughly 1990 to 1995. In partial exchange for his
26 contributions to CYBS, he received a serialized stock certificate. To this day, CYBS
27 continues to correspond with John Pettitt regarding his stock and his pension fund and the
28

1 company knows precisely where he lives. However, sometime in or about 2004,
2 Defendant caused CYBS to issue a duplicate stock certificate representing the stock
3 owned by John Pettitt (which he placed into the MAX GSD TRUST OF 1996).
4 Defendant then seized the shares of CYBS stock and sold them without notice and due
5 process. As a result of the Defendant's actions, the MAX GSD TRUST OF 1998
6 established by John Pettitt holds the original stock certificate that is now worthless.
7

8
9 **B. The Decision To Sell Plaintiffs' Property.**

10 14. Since the inception of the Unclaimed Property program until 1989 the internal
11 policy of the Controller's Office was to retain a "position," or number of shares of stock
12 that escheated to the Controller under the UPL, so that stockowners who filed claims with
13 the Controller could be paid later in certificate form.
14

15 15. The UPL operates under the legal fiction that an individual has abandoned his
16 investment if certain indicia are met, such as the failure to cash dividends, vote on a
17 merger, or mail in a proxy over an extended period of time. Until the 1970s, the period
18 of time to establish "abandonment" was 16 years. As California became increasingly
19 cash-strapped, the UPL was identified as a revenue source, and the period of presumptive
20 abandonment was shortened to three years, and is in some cases arbitrarily shortened
21 even further to as little as six months. Thus, Defendant now presumes abandonment and
22 seizes and sells stock investments after a period of as little as or less than three years if
23 the arbitrary indicia of "abandonment" are met, in the estimation of Defendant.
24

25 16. Defendant takes these actions though the individual is known to the issuing
26 corporation, and a list of the known owners of the stock is provided to the Defendant that
27
28

DOHERTY GEORGESON KERLEY LLP
999 Fifth Avenue, Suite 400
San Rafael, CA 94901
(415) 453-2300

1 includes, in nearly every case, the stockowners' addresses, and taxpayer or social security
2 numbers. The Defendant sells the investments and deposits the proceeds in the general
3 fund.
4

5 17. The original rationale for maintaining a stock position was so that claimants could
6 be paid in certificate form as they stepped forward to claim their property. The original
7 policy of payment in certificate form avoided exposure to the fluctuations of the stock
8 market and the situation where the Defendant may have sold stocks for a loss, due to the
9 vagaries of the stock market. The unwritten rule created by policy makers at the
10 Defendant's Office prior to 1989 is that they did not feel that the Defendant should be
11 exposed to liability based on the increased value of the given stock investment, hence the
12 internal policy of compensating the owner in certificate form.
13
14

15 18. Beginning in 1989, this unwritten internal policy of compensating the claimant in
16 certificate form was discarded by Defendant, and other internal policies discussed below,
17 were permanently changed. Now the Defendant immediately sells any stock that comes
18 into his possession, within a short time after its receipt.
19

20 **C. Disregard of Notice and Due Process Obligations.**

21 19. Under California's treatment of Unclaimed Property, California Code of Civil
22 Procedure § 1300, *et seq.*, Defendant does not publish the names of the stockholders
23 whose property is taken into custody and sold by Defendant. Instead, Section 1531 of the
24 California Code of Civil Procedure requires the Controller to publish only a generic
25 "block ad" in newspapers of general circulation within the State of California. Under the
26 terms of the UPL, the Controller is required to provide direct mail notice to the
27
28

1 Stockholder if Defendant is notified of a social security number. Defendant is supposed
 2 to contact the Franchise Tax Board to obtain a current mailing address for the person
 3 associated with the social security number, but Defendant does not do so in every case
 4 where a social security number is known. The “block ad” notice violates the Due Process
 5 Clause of the United States Constitution, as it does not provide notice to apprise
 6 stockholders of the fact that their property has been seized and a meaningful opportunity
 7 to recover it. *Jones v. Flowers* (2006) 547 U.S. 220. *Taylor v. Westly*, 402 F.3d 924, 934
 8 (9th Cir. 2005); *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306.

11 20. Moreover, certain classes of individuals, namely those whose social security
 12 number is not provided to the Defendant receive no notice whatsoever, even the
 13 inadequate notice required by Section 1531 of the UPL. For this reason, Section 1531 of
 14 the UPL is unconstitutional because it does not provide notice that is reasonable under the
 15 circumstances to alert stockholders that their property has been taken into the custody of
 16 Defendant to be sold for the use of the State.

19 **D. Defendant Violated His Constitutional Duties.**

20 21. The Defendant is obligated by his oath of office to uphold the California and
 21 United States Constitutions. Defendant’s seizure and sale of the CYBS stock without
 22 notice and due process is a gross violation of law and repugnant to our form of
 23 government.

25 22. Defendant has adopted policies that, when combined with the failure to provide notice,
 26 operate to inflict immediate and irreparable harm on stockholders. One such policy is to sell
 27 stock immediately upon taking the share certificates into custody. The effect of this policy is
 28

1 to render it impossible for a stockholder to recover the stock itself, whether or not it was
 2 properly escheated and whether or not due process has been provided. Instead, Defendant
 3 forces the owners to accept an "account" in an amount determined by Defendant, purportedly
 4 representing the proceeds of the sale of the stock. This "account" is net of commissions and
 5 costs, which are determined by Defendant without any published guidelines or rationale. For
 6 example, the Defendant's records indicate that Plaintiff John Pettitt is entitled to roughly
 7 \$663,000.00, when his investment should have reached a recent high in excess of \$1,300,000
 8 (100,000 x \$13.00 per share = \$1,300,000). In addition, the sale of the securities triggered an
 9 instant tax liability for Plaintiffs.
 10

11 **E. The Controller Violated His Own State Laws, Such As The Unclaimed Property Act**
 12 **(UPL), Code of Civil Procedure §§ 1300, et seq. So That His Action Are *Ultra Vires* And**
 13 **Outside The Law.**

14 23. A fundamental purpose of the Unclaimed Property Law (UPL) that the
 15 Defendant swore to uphold is to protect unknown owners by locating them and restoring
 16 their property. Defendant breached the UPL by confiscating the property of Plaintiffs
 17 without notice, and selling their stock investments without their knowledge. Plaintiff
 18 alleges specific examples of the statutory breaches as follows:

19 24. Defendant is charged with the responsibility of upholding the UPL and protecting
 20 the public from its misapplication. At all times Plaintiffs allege that their identities and
 21 locations were known, or should have been known to Defendant upon exercise of
 22 reasonable due diligence. Defendant simply failed or refused to carry out his statutory
 23 obligations.
 24

25 25. Likewise, through the Plaintiffs' records contain social security and taxpayer
 26 identification numbers, Defendant failed to request that the Franchise Tax Board provide
 27 current addresses in order to provide Plaintiffs with notice by direct mail as required by
 28

1 statute.

2 26. Some Owners receive no notice at all, even if the Defendant upholds all of his
3 notice obligations under the UPL. Specifically, the publication “notice” (which violates
4 the *Mullane* standard and is insufficient to provide true notice to a reasonable person that
5 his property has been seized) is only required in newspapers in California, which
6 represents only a subset of Owners of “unclaimed” property in the Defendant’s custody
7 pursuant to UPL. Similarly, direct mail notice is required only when the Defendant
8 receives a social security number from the Holder. Again, this is only a subset of the
9 Owners of “unclaimed” property in the Defendant’s custody pursuant to the UPL.
10 Excluded from *any* form of notice, no matter how insufficient, are Owners who (a) live
11 anywhere other than California, and (b) whose Holders do not provide a social security
12 number to the Defendant. This would include *any* foreign citizen living in his native
13 country whose stock is seized, since foreign citizens living outside of California whose
14 Holder does not properly report the social security number to the Controller, whether the
15 citizen has a social security number or not, and whether or not the Holder complies with
16 its own obligations under the UPL, would receive no notice..

21 **FIRST CAUSE OF ACTION**
22 **(Violation of 42 U.S.C. §1983)**
23 **(Procedural Due Process)**

24 27. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 26 as
25 though fully set forth herein.

26 28. The Due Process Clause of the United States Constitution prohibits the State of
27 California from depriving citizens of a protected property interest without due process of
28

1 law.

2 29. Plaintiffs had a constitutionally protected property interest in the CYBS stock.

3 Defendant seized and liquidated Plaintiffs' CYBS stock. The seizure and sale of
4 Plaintiffs' stock stripped Plaintiffs of their right to obtain the benefits of years of
5 appreciation of the stock, triggered capital gains taxes, and resulted in other unnecessary
6 fees and costs.

7
8 30. Defendant deprived Plaintiffs of their protected property interests without due
9 process of law by:

11 (a) Failing to provide timely mail notice to Plaintiffs, whose identity and
12 contact information Defendant either knew, or by the exercise of reasonable
13 diligence, should have known; and

14 (b) Failing to provide timely publication notice to Plaintiffs that their
15 property had escheated to the State of California pursuant to the UPL.

16 31. Defendant's failure to comply with the requirements of the Due Process Clause of
17 the United States Constitution in the manners outlined above has resulted in substantial
18 monetary losses to Plaintiffs.

19 32. Based upon the foregoing, Plaintiffs are entitled to and hereby seek restitution of
20 their property and monetary damages, in a manner commensurate with the injuries they
21 have suffered as a result of Defendant's violations of the Due Process Clause and the
22 Fourteenth Amendment to the United States Constitution.

24 **SECOND CAUSE OF ACTION**
25 **(The Unclaimed Property Act)**

26 33. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 32 as
27 though fully set forth herein.
28

34. A primary and fundamental purpose of California's Unclaimed Property Act ("UPL") is to protect unknown owners by locating them and restoring their property to them.

35. The UPL in effect during the relevant time period either expressly or impliedly required Defendant to:

- (a) Exercise reasonable diligence in determining whether, as a threshold matter, Plaintiffs' property was even subject to the UPL. Property only is subject to the UPL when its owners' identities and locations are "unknown." Thus, Defendant bore the initial responsibility of determining whether Plaintiffs identities and locations were in fact "unknown;"
- (b) Publish timely notice to Plaintiffs of the escheatment of their property in the newspapers most likely to give each of these particular Plaintiffs notice that their property had escheated to the State of California;
- (c) Include within the published notice described in section (b), the actual names of Plaintiffs;
- (d) Mail timely notice to Plaintiffs of the escheatment of their property;
- (e) Verify that the holders of Plaintiffs' property prior to escheatment ("Holders") had accurately reported Plaintiffs' stock investments (CCP § 1530, delivered all of Plaintiffs' property (CCP§ 1532), and properly transmitted notice to Plaintiffs prior to escheating Plaintiffs' stock (CCP §1513.5);
- (f) Assign a value to Plaintiffs' stock upon liquidating it that was rationally related to the time and manner that Plaintiffs' stock was or should have been sold.

36. Based upon the foregoing, Plaintiffs are entitled to and hereby seek restitution of their Property or the value thereof from the Unclaimed Property Fund, or, alternatively, monetary Damages, in a manner commensurate with the injuries they have suffered as a result of Defendant's violations of the Unclaimed Property Law.

///

///

///

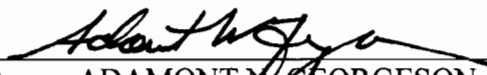
1 **III. Prayer for Relief**

2 **WHEREFORE**, Plaintiffs pray for judgment against Defendant as follows:

- 3 1. For Restitution
4 2. For Compensatory Damages
5 3. For Attorneys' fees and costs
6 4. For such other action that is just and proper
7
8
9

10 Dated: November 15, 2007, at San Rafael, California.
11

12
13 DOHERTY GEORGESON KERLEY LLP
14
15

16
17 
18 By: ADAMONT M. GEORGESON,
19 Attorney for Plaintiffs
20
21
22
23
24
25
26
27
28


DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

DOHERTY GEORGESON KERLEY LLP

Dated: November 15, 2007

By: _____


ADAMONT N. GEORGESON
Attorney for Plaintiffs

DOHERTY GEORGESON KERLEY LLP
999 Fifth Avenue, Suite 400
San Rafael, CA 94901
(415) 453-2300